

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 6, 2018**

Diane M. Fremgen  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP707-CR**

**Cir. Ct. No. 2013CF144**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JUSTIN L. DOUGLAS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Justin Douglas appeals a judgment, entered upon his no-contest pleas, convicting him of burglary of a building or dwelling and theft of movable property with special facts, both counts as party to a crime. Douglas also appeals the order denying his postconviction motion for resentencing or plea withdrawal. Douglas argues the circuit court erred by denying his postconviction motion without an evidentiary hearing. We agree. Therefore, we reverse the order and remand the matter to the circuit court with directions to hold a hearing.

### **BACKGROUND**

¶2 The State charged Douglas with two counts of burglary and five counts of theft. In exchange for Douglas's no-contest pleas to one burglary count and one theft count, the State agreed to dismiss and read in the remaining counts. With respect to the burglary count, the parties agreed to defer entry of judgment for one year, during which Douglas agreed to certain conditions, including that he would not commit any criminal acts. With respect to the theft count, the State agreed to recommend a withheld sentence with two years' probation consecutive to any existing sentence. The matter was scheduled for sentencing, and Douglas was released on a signature bond.

¶3 While released on bond, Douglas was alleged to have committed additional crimes, including sexual assault of a child under the age of thirteen; sexual exploitation of a child; sexual exploitation of a child-filming; possession of child pornography; and felony bail jumping. On the basis of the new charges, the circuit court granted the State's motion to revoke the deferred entry of judgment agreement and the matter proceeded to sentencing. The State had made no sentencing concession with respect to the burglary conviction, and it ultimately recommended the maximum twelve and one-half-year sentence on that count,

consisting of seven and one-half years' initial confinement and five years' extended supervision. Out of a maximum possible six-year sentence on the theft conviction, the State recommended a withheld sentence and three years of probation, instead of the two years negotiated under the plea agreement. Defense counsel did not object to this breach of the plea agreement.

¶4 The circuit court ultimately imposed the maximum possible sentences for both counts, concurrent with each other but consecutive to any other sentence. Douglas filed a postconviction motion for resentencing or plea withdrawal, claiming the State breached the plea agreement and his counsel was ineffective by failing to object to the breach. The circuit court denied the motion without a hearing. This appeal follows.

### DISCUSSION

¶5 A defendant has a constitutional right to enforce a negotiated plea agreement. *State v. Smith*, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). “[O]nce the defendant has given up his [or her] bargaining chip by pleading guilty, due process requires that the defendant’s expectations be fulfilled.” *Id.* (citation omitted). A plea agreement is breached when the prosecutor does not make the negotiated sentencing recommendation. *Id.* at 272. To be actionable, however, a breach must not merely be technical but, rather, must deprive the party of a substantial and material benefit for which he or she bargained. *State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). If the breach is material and substantial, a defendant may be entitled to resentencing or plea withdrawal, as the sentencing court, in its discretion, deems appropriate. *See State v. Howard*, 2001 WI App 137, ¶¶36-37, 246 Wis. 2d 475, 630 N.W.2d 244. Whether the State breached the plea agreement and, if so, whether the breach was material and

substantial are questions of law that we review de novo. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844.

¶6 Here, the State concedes it breached the plea agreement when it recommended three years of probation, instead of the two years of probation negotiated as part of the plea deal on the theft conviction. The State, however, contends the breach was merely technical because the court completely rejected the probation alternative and imposed the maximum possible prison sentence, thus suggesting the State’s misstatement had no impact on the circuit court’s sentencing decision. As the State also acknowledges, however, a breach remains a breach regardless of whether the circuit court “was influenced by the State’s alleged breach or chose to ignore the State’s recommendation.” *Howard*, 246 Wis. 2d 475, ¶14.

¶7 The State nevertheless posits that if the court *had* followed the State’s erroneous three-year probation recommendation for the theft offense, that three-year probation term would have run concurrent with the seven and one-half year term of initial confinement imposed on the burglary offense. Thus, according to the State, one extra year of concurrent probation would have had no effect on the actual punishment Douglas experienced. We are not persuaded. Because a defendant’s probation can be revoked while in prison, we cannot say that one additional year of probation makes no difference, as the defendant would be at risk for probation revocation during that additional year. The State’s recommendation of three, rather than two, years of probation constituted a material and substantial breach of the plea agreement.

¶8 Because Douglas did not object to the State’s breach of the plea agreement, Douglas’s postconviction motion necessarily alleged his trial counsel

was ineffective by failing to object to the breach. To succeed on an ineffective assistance of counsel claim, Douglas must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶9 It is a prerequisite to appellate review of an ineffective assistance claim that the challenged attorney explain his or her actions at a postconviction evidentiary hearing. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The circuit court must hold a *Machner* hearing if the defendant's motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the defendant's motion meets this standard is a question of law that we review independently. *Id.* "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[,] the circuit court has discretion to deny the defendant's motion without a hearing. *Id.*

¶10 Here, the circuit court denied the postconviction motion without a hearing, concluding there was "no harm no foul" because trial counsel's failure to object to the State's breach made no difference to the sentence imposed. However, when an attorney performs deficiently by failing to object to a substantial and material breach of the plea agreement, the defense is automatically prejudiced. *Howard*, 246 Wis. 2d 475, ¶26. Thus, if Douglas can establish counsel's performance was deficient, prejudice will be presumed. *Id.* By denying the postconviction motion without a *Machner* hearing, Douglas was deprived of the opportunity to prove his trial counsel was deficient.

¶11 Given the specific factual allegations in Douglas’s postconviction motion, the circuit court should have conducted an evidentiary hearing in order to assess whether Douglas’s trial counsel performed deficiently. Accordingly, we reverse and remand this matter for the circuit court to conduct a *Machner* hearing and determine whether trial counsel performed deficiently by failing to object to the State’s breach of the plea agreement. If the circuit court concludes counsel was deficient, the court should exercise its discretion in selecting the appropriate remedy for the State’s breach.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

